In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON, ET AL.,
APPELLANTS,

v.

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL, ET AL.,
APPELLEES.

MOTION OF ASSOCIATED INDUSTRIES OF MASSACHUSETS, INC. AND OTHERS FOR LEAVE TO FILE A BRIEF

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TABLE OF CONTENTS

Table of Citations

Cases

Constitutional Provisions

Statutes

Miscellaneous

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Associated Industries of Massachusetts, Inc., Greater Boston Chamber of Commerce and The Massachusetts Taxpayers Foundation, Inc., move, in accordance with Rule 42, for Leave To File a Brief in support of jurisdiction in the above entitled case. In support of this motion, movants represent:

1. Appellee Attorney General of Massachusetts has assented to this brief.

2. In this case, the supreme judicial court of Massachusetts has upheld the constitutionality of a Massachusetts statute which in specific terms bars business corporations from spending corporate funds to oppose a graduated personal income tax. The state court took the position that a corporation has free speech rights only insofar as the speech involved is demonstrated to affect its business or property; and that there was no such proof here, because the parties stipulated that the economists were divided on whether enactment of graduated personal income tax would so affect any corporation.

3. The specific holding in this case as well as its general theory of the extent to which corporations have free speech rights is of enormous importance to the movants herein. Movants are completely opposed to the view that the present restriction upon corporate opposition to a graduated personal income tax is constitutional. They believe that a graduated personal income tax would have a substantial adverse effect upon business corporations in Massachusetts and ultimately upon the economic situation in Massachusetts. They thus show the important and widely based concern for the position asserted by appellants. More generally, they have an interest far transcending this case in terms of the restrictive view of the state courts on the free speech rights of corporations, and the style, format and emphasis of their arguments on this issue may differ from that of appellants.

4. The movants are as follows:
   (a) Associated Industries of Massachusetts, Inc., is a non-profit corporation with approximately 2,500 manufacturing member companies located throughout the Commonwealth. The Association, whose member companies employ the major portion of Massachusetts manufacturing employees,

is the recognized spokesman for manufacturing industry in the Commonwealth. Its purposes include: improving the economic climate of Massachusetts in the public interest and advocating fair and equitable legislation and other public policies affecting the interest of its members and their employees.

   (b) The Greater Boston Chamber of Commerce is a widely based business organization duly established under the laws of this Commonwealth as a nonprofit organization with approximately 1,500 members. Its purpose is to protect and promote the commercial, industrial and public interest of Boston and the greater Boston metropolitan area.

   (c) The Massachusetts Taxpayers Foundation, Inc., is a nonprofit corporation with approximately 1400 members representing business corporations, financial institutions, members of the professions and individuals who are concerned with the problems of taxation and public expenditure at both the state and local levels. The Foundation is a recognized spokesman for the Massachusetts taxpayer, files and supports legislation, and publishes research reports and papers on virtually all facets of public finance and taxation.

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BRIEF OF AMICI CURIAE IN SUPPORT OF JURISDICTION

Interest of the Amici Curiae

The interest of the amici is described in the motion for leave to file this brief.

Statement of the Case

Stripped of unessentials, the crucial facts are readily summarized. G.L. c. 55, §8 forbids business corporations from expending any monies to communicate their views *on state ballot questions* unless those questions materi-

ally affect their "property business or assets"[1] But §8 goes on to provide specifically that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions" of *individuals* "shall be deemed materially to affect . . . [a] corporation." The constitutional validity of this limiting proviso is at issue here.

The November 2, 1976 Massachusetts ballot contained referendum question #2 which proposed adding an amendment to the state constitution. This would authorize the state legislature to formulate a graduated income tax.[2] The First National Bank of Boston and four other corporations[3] wished to contribute to efforts to defeat that proposal, but were barred from doing so because of the §8 proviso. They thereupon commenced an original action in the state supreme judicial court against the attorney general seeking, *inter alia*, a declaration that the proviso denied them their federal constitutional guarantees of freedom of speech and equal protection. On September 22, 1976, the supreme judicial court entered a brief two-page order denying relief, squarely rejecting the federal claims. On February 1, 1977, the court filed its opinion.[4] So far as material here, the court rejected the federal claims on the ground that corporations do not have the same rights to free speech as natural persons; that they must show that

[1] The statute also prohibits the expenditure of funds to support the election of public officials.

[2] The current provisions of the state constitution forbid such legislation. *Mass. Const. Amend. Art. 44.* If the legislature proposes to amend the constitution, it must submit the proposed amendment to the voters. *Mass. Const. Amend. Art. 48,* Init. Pt. 4, §5.

[3] New England Merchants National Bank, The Gillette Company, Digital Equipment Corp. and Wyman-Gordon Co.

[4] The opinion is reproduced in the appellant's jurisdictional statement. The delay in the opinion occurred because the supreme judicial court has been at less than full strength because of resignations and illness. A timely notice of appeal has been filed.

their speech affects their business or property; and that no such proof was present here, the parties having stipulated that a division of opinion among economists existed on the issue. (Op. pp. 12-17).

On November 2, 1976 the Massachusetts voters defeated the proposed constitutional amendment.

Questions Presented

1. Is the case moot because the November 2, 1976 election has passed?

2. Insofar as it prevents corporations from expending funds to oppose a referendum on a graduated personal income tax is G.L. c. 55, §8 invalid as a denial of freedom of speech and equal protection of the laws?

The Questions Are Substantial

Point I. The Case Is Not Moot.

The specific occasion giving rise to this controversy has ended. The November 1976 election has come and gone and the referendum item pertaining to the graduated personal income tax has been defeated by the Massachusetts voters. Despite this fact, this appeal is not moot.

Article III requires that a "live controversy" exist at all stages of the litigation in the federal courts. E.g., *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975). But it does not follow that because the specific controversy has ended, the case automatically becomes moot. For example, in *Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 115 (1974), plaintiff's employers asserted that state welfare regulations entitling striking workers to welfare assistance were inconsistent with federal labor policy. This Court held that termination of the strike before trial did not moot the case,

because by its "continuing and brooding presence" (*id.* at 124) the state policy would affect the "ongoing collective [bargaining] relationship" between the parties. (*Id.* at 129.) See also *Scott* v. *Kentucky Parole Board*, 97 S.Ct. 342, 344 (1976) (dissenting opinion). More closely to the point here is the "capable of repetition, yet evading review" doctrine of *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). See *Sosna* v. *Iowa, supra*, 419 U.S. at 399-401. This doctrine recognizes that there is a class of cases which could be lost to this Court's review altogether because the specific underlying controversy would end before appellate review could be obtained, and that, so far as possible, article III should not be read to undercut the central function of this Court in giving "unity and coherence" to federal law. L. Jaffe, *Judicial Control of Administrative Action*, 589-90 (1965). This is particularly true in constitutional cases where this Court has a special function in the maintenance of the constitutional order,[5] a function around which, as Professor Bickel rightly observed, "[s]ettled expectations have formed." Bickel, *The Least Dangerous Branch*, 14 (1962).

The "capable of repetition yet evading review" doctrine is not an "exception" to article III. The *minimum* requirement of a "live controversy" is satisfied under this doctrine so long as there is a reasonable possibility that the issue is capable of repetition between the existing parties—so long, that is, as there is "a reasonable expectation that the same party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).[6] Where this Court has been satisfied that it was impossible or highly improbable that the controversy could arise again

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[5] Monaghan, *Constitutional Adjudication: The Who and When*, 83 Yale L.J. 1363, 1368-71 (1973).

[6] In class actions, if the suit were moot as to the named plaintiffs, the suit could nonetheless continue if the issue were likely to recur as to the members of the class, *Sosna* v. *Iowa, supra*.

between the specific parties the case has been held moot. E.g., *Weinstein* v. *Bradford, supra, DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *Craig* v. *Boren,* 97 S.Ct. — (1976). By contrast, however, jurisdiction has been sustained where there seemed a reasonable likelihood that the issue could recur. E.g., *Moore* v. *Ogilvie,* 394 U.S. 814 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); and *Roe* v. *Wade,* 410 U.S. 113, 125 (1973). This fact is particularly evident in the context of first amendment claims. E.g., *Nebraska Press Ass'n* v. *Stuart,* 96 S.Ct. 2791, 2797 (1976).[7]

The *Southern Pacific Terminal* doctrine has undergone some transition over time. At one point it seemed that the requirement was simply that the *issue* could arise again, but recent decisions make clear that the issue must be capable of arising between the parties to the litigation.[8] *Weinstein* v. *Bradford, supra.* Moreover, in *Franks* v. *Bowman,* 96 S.Ct. 1251 (1976) the Court observed that the "yet evading review" aspect of the doctrine was "a self-imposed limitation of judicial restraint, not one of constitutional dimension." (96 S.Ct. at note 8 and related text.) The issue in *Franks* was one "capable of repetition" but not necessarily one "evading future review". Nonetheless, both the majority and dissenting opinions were in agreement that the issue was properly before the Court.[9] On both principle and authority it seems clear that all that is constitutionally required under article III to avoid mootness is that the issue be reasonably capable of repetition between the parties.

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[7] See also the Court's liberal construction of the final judgment rule of 28 U.S.C. §1257 where review of free speech claims might otherwise be lost. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477-86 (1975).

[8] Monaghan, *supra* note 5 at 1385 n.142.

[9] *Franks* was, to be sure, a class action, but that is irrelevant. *Southern Pacific* is not a doctrine uniquely related to class actions. It can be invoked by a single plaintiff, or by a class if the issue is moot as to the named plaintiff.

This Court has been particularly willing to apply the *Southern Pacific Terminal* in election law cases, and accordingly, has repeatedly sustained its jurisdiction although the specific election had been ended. E.g., *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330, 333 n.2 (1972); *Rosario* v. *Rockefeller,* 410 U.S. 752, 756 n.5 (1973). *Storer* v. *Brown,* 415 U.S. 724 (1974) is particularly instructive here. *Storer* presented various challenges to the California election laws relating to the placement of independent federal office candidates on the California ballot. The Court addresses the mootness question in a footnote which reads in its entirety as follows:

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.' [Citations omitted.] The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." (*Id.* at 737 n.8.)

In the only cases in which mootness claims have been sustained in the election context it has been because of factors *other than the passing of the election.*[10]

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[10] *Golden* v. *Zwickler,* 394 U.S. 103 (1969) (congressman, target of election handbills, appointed to bench); *Brockington* v. *Rhodes,*

We submit that the present case is controlled by the *Storer* principles.

1. G.L. c. 55, §8 imposes a fixed duty upon the plaintiffs. They are under a *continuing* duty not to make the expenditures sought here.[11] E.g., *Roe* v. *Wade, supra* (plaintiff under a continuing duty not to undergo proscribed abortions). Moreover, the state policy is fixed and definite; it "is not contingent upon executive discretion". *Super Tire Engineering Corp.* v. *McCorkle, supra,* 416 U.S. at 124. And the attorney general has consistently taken the view that the statute will be enforced. Indeed, even if a subsequent attorney general were of the opinion that the §8 proviso was invalid he could not reasonably interpose his judgment given the decision of the supreme judicial court in this case upholding the statute.[12]

2. There is, moreover, a reasonable likelihood of the recurrence of this problem between the parties. This "likelihood" is a matter not to be brushed aside on a generalized premise that there may never be another referendum question dealing with the graduated personal income tax, any more than this Court brushed aside the plaintiffs in the cited election cases because they might never be concerned with a future election. That contingency did not moot the

396 U.S. 41, 43 (1969) ("limited nature of the relief sought". Plaintiff sought mandamus to certify him as a candidate.) *Hall* v. *Beals,* 396 U.S. 45 (1969) (because of intervening change in state law plaintiff not a representative of class he sought to represent).

[11] Compare *Weinstein* v. *Bradford, supra* (attack on parole board procedures; prisoner released from custody). *DeFunis* v. *Odegaard, supra* (attack on law school admission procedures; plaintiff to graduate from law school). *Craig* v. *Boren, supra* (male plaintiff complaining of gender based discrimination against males under 21 became 21). In each of these cases subsequent events released the plaintiffs forever from the effects of the disabilities which they had initially challenged.

[12] Compare *Spomer* v. *Littleton,* 414 U.S. 514 (1974) holding moot a suit challenging the misconduct of a state's attorney absent allegations that his successor would continue the same policies.

election plaintiffs' claim, and it should not moot this case. Moreover, on the issue of recurrence, here, as elsewhere, the teachings of history, not logic, are important. Holmes, *The Common Law,* 1 (1881). Massachusetts elections in the last decade and a half have witnessed regular attempts to obtain approval of a graduated personal income tax amendment. Finally, there is powerful and continuing political support inside the Commonwealth for a graduated income tax. The nature of that support is indicated most clearly from the brief of the intervening defendants filed in court below. We quote paragraph 3 of its statement of facts:

> "(3) The intervening defendant Coalition for Tax Reform, Inc. (CTR) is a non-profit corporation organized and existing under the laws of Massachusetts. CTR is a so-called 'umbrella' organization of individuals and other membership organizations, set up for the primary purpose of working for passage of the graduated income tax amendment to the state constitution. Its member organizations include the League of Women Voters, the Massachusetts Teachers Association, Americans for Democratic Action, Massachusetts Fair Share, Inc., Common Cause, National Association of Social Workers, Massachusetts Council of Churches, United Peoples, Inc., and others. CTR was the principal advocate of the graduated income tax (GIT) in the 1972 referendum campaign and expects it will be the principal advocate in the 1976 campaign.

3. The validity of §8's proviso seems to be one "evading review". Both the attorney general and the intervening defendants, for example, assert that a trial and findings of fact are necessary on the issue whether a referendum with respect to a graduated income tax would, in fact

materially affect a corporation's business.[13] The trial envisaged by the intervening defendants is obviously complicated; it necessarily requires testimony with respect to generalized economic and social matters, not with respect to "adjudicative" facts. Following that trial there would presumably be an opinion by the judge, followed by subsequent proceedings in the state supreme court, and finally an appeal to this Court. While one cannot speak with certainty, it is exceedingly doubtful that the case envisaged by the intervenors could be developed fully in time to be presented and decided by this Court in time to affect any specific ballot referendum. Even if a full factual record is not required, as plaintiffs contend, the same seems true. Plaintiffs, if they are not to be faced with ripeness difficulties, must wait until the referendum is certified for the ballot. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21 (1974). *O'Shea* v. *Littleton*, 414 U.S. 488, 495-98 (1974). And litigation is a time-consuming process.[14]

In any event, we submit that the "evading review" component of the *Southern Pacific Terminal* doctrine is a matter of judicial discretion, not one of article III dimension.

Accordingly, we submit that this case is not moot. At the minimum, the mootness issue itself is substantial enough to warrant fuller consideration in the context of briefs on the merits.

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[13] This case was submitted on an agreed statement of facts in which the parties simply asserted their beliefs on this issue, and that economists were divided on the issue (Op. p. 17).

[14] Moreover, the heavy penalties for violation of §8 statute discourages challenges to the statute by way of a violation. Statutes of this character are particularly threatening to first amendment interests. Freund, *The Supreme Court of the United States: Its Business, Purpose and Politics*, 65 (1961). In any event, first amendment considerations strongly favor prospective relief here, particularly since there are no countervailing federalism considerations. Monaghan, *First Amendment Due Process*, 83 Harv.L.Rev. 517, 547-49 (1970).

POINT II. G.L. c. 55, §8, VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

If the content restriction contained in the §8 proviso were imposed upon individuals, its invalidity would be too plain for argument. *Buckley* v. *Valeo*, 424 U.S. 1 (1976). That much was conceded in the court below. Nonetheless, various arguments were made that the proviso was valid as applied to business corporations. This argument was, in turn, grounded upon the premise that business corporations lack significant free speech protection.

The constitutional guarantee of freedom of speech is, of course, part of the "liberty" secured to all "persons" by the due process clause of the Fourteenth Amendment. That corporations are "persons" within the meaning of the amendment was considered too clear for argument nearly a century ago. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U.S. 394, 397 (1886). Accordingly, the reports of this Court are replete with decisions in which corporations have successfully urged freedom of speech claims. E.g., *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). Nor, as was suggested below, is the right to full protection restricted to corporations engaged in the business of disseminating information. For example, corporate employers have long been recognized as possessing a constitutional right to freedom of speech in connection with opposition to labor union organization. *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617-618 (1969).[15] So too have bars urging that restrictions upon topless dancing violate the constitution. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) (plaintiffs are "three corporations which operate bars within the town").

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[15] See also the first amendment protection accorded to labor unions even though their principal activity is not the dissemination of ideas. E.g., *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971).

More recently, this Court has held that commercial speech is also within the ambit of the first amendment. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumers' Council*, 425 U.S. 748 (1976). No serious contention could be made that *Virginia Citizens'* constitutional protection for truthful advertising is unavailable to corporations. See, for example, the cases cited at 425 U.S. at 764-65, and *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3rd Cir. 1976).[16] The argument that only corporations engaged in the business of disseminating ideas possess full free speech protection is without any textual or decisional support; it is, moreover, wholly unresponsive to any conceivable conception of the first amendment, which seeks to protect the interest of both the speaker and his audience. *Virginia Citizens Consumer's Council, Inc., supra*, 425 U.S. at 756-57.

The teaching of the foregoing cases is plain. Corporations have the right of free speech, as part of the "liberty" secured to them by the due process clause. That right is *not* granted by state law, any more than a corporation's right to freedom from unreasonable search and seizure or to equal protection of the laws.[17] Accordingly, the crucial question in this case must turn upon the weight of the state interest advanced in support of the particular statutory restriction on the constitutional freedom. No clear legislative history illuminates the justifications for §8 proviso, and only two grounds were advanced below. Each will be considered, in turn.

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[16] See also the pre *Virginia Citizens Council* cases denying first amendment protection to corporations for commercial speech which are collected in 1 Emerson, Haber & Dorsen, *Political & Civil Rights in the United States*, 551-555 (4th ed. 1976), none of which remotely suggests that constitutional protection was denied because corporations, rather than individuals, were involved.

[17] *G. M. Leasing Corp.* v. *United States*, ___ U.S. ___ (1977), 45 U.S.L.W. 4098, 4103: "Nor can it be claimed that corporations are without some Fourth Amendment rights."

A.

The intervenors vigorously argued the proviso's real purpose is a fear that corporate wealth would "drown" out the voice of its opponents on the specific issue of a graduate personal income tax. That interest was not relied upon by the court. It is, moreover, plainly impermissible as to individuals under *Buckley* v. *Valeo*, 424 U.S. 1, 18-19, where this Court observed, *inter alia*, that

> "A restriction on the amounts of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."

See also *Schwartz* v. *Romnes*, 495 F.2d 844, 851 (2nd Cir. 1974). By what alchemy does a constitutionally impermissible interest suddenly become transformed into a constitutionally permissible one simply because the identity of the speaker changes from an individual to a corporation? There is simply "no justification for treating [plaintiffs] differently in these circumstances simply because [they are] corporations." *G. M. Leasing Corp.* v. *United States*, *supra*, note 17, 45 U.S.L.W. at 4103. Indeed, the *Buckley* condemnation applies *a fortiori* here. Section 8 is not an effort to restrict the *amount* of expenditures, as was the statute invalidated in *Buckley*, but the *content* of the speech no matter how little is in fact spent by the corporation.

Moreover, the corporate wealth justification cannot explain §8's patently underinclusive character. Other substantial aggregate of business wealth, such as real estate investment trusts (REIT's), partnerships,[18] and labor

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[18] It is stipulated that there are some 15,000 partnerships in the Commonwealth (J.S. p. ___).

unions are permitted to speak on this issue. The efforts were made to distinguish some of these situations,[19] but the attorney general conceded that REIT's (which have transferable shares) cannot be distinguished from corporations. There are 7,500 such business units in Massachusetts and they possess enormous wealth. (The twenty largest REIT's have assets in excess of 5 billion dollars (J.S. p. —).

Whatever may be the permissible range of state regulation based on the content of speech, see the discussions in *Young* v. *American Mini Theatres*, 426 U.S. — (1976), we are aware of no decision in this Court which would remotely support the regulation of the content here involved. In any event, the important character of the issue raised is apparent. Federal statutes, for example, impose substantial restrictions upon the political activities of both unions and corporations and their constitutionality remains to be adjudicated. See Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. of Chi. L. Rev. 148 (1974). Here, Massachusetts has imposed a substantial restriction upon corporate political activity and its validity *vel non* plainly presents an issue whose significance is far beyond the confines of this particular case.

B.

The only other ground advanced below in support of §8's proviso was plaintiffs failed to "prove" that in fact a graduated personal income tax would "affect" the business of a corporation. That was the ground adopted by the supreme judicial court (Op. pp. 13-17). That argument is

[19] The attorney general argued that partnerships can be distinguished because they exist independently of statutory permission. But they are subject to extensive regulation, see G.L. chapters 108 and 109 on partnership and limited partnerships. And unless *Lochner* v. *N. Y.*, 198 U.S. 45 (1905), is revived, partnerships could be prohibited entirely, or their existence made conditional upon receipt of a state license or charter.

not without its wry aspects. It was, after all, advanced by those not engaged in business, and opposed by the five corporate business plaintiffs in this case who are willing to expend funds in litigation to free themselves from the statutory restriction. Moreover, the plaintiffs are fully supported here by the amici which are comprised largely of business corporations.

In any event, the thrust of the "no affect" argument is apparently that if corporate speech in connection with the graduated income tax does not "affect" the corporation, it would be "ultra vires". Thus, the §8 proviso simply prohibits corporate management from straying from the purpose of the corporate charter.

The "no affect" argument rests upon the plainly false foundation. As the cases previously discussed (e.g., *Gissel, Conrad, Virginia Citizens Council*) make clear, that right is conferred not by state law but by the constitution of the United States. Moreover, it is not usually the case that the protected character of the federal right to speech depends upon a demonstration of its truth, *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 271-74 (1964), particularly where, as here, the "truth" consists of judicial resolution of a claim that a graduated personal income tax will have an adverse effect on the businesses engaged in by Massachusetts corporations.[20] But in this respect we note that plaintiff corporations and the amici's belief that a graduated income tax would adversely "affect" their business operations is hardly irrational; indeed, the court below expressly acknowledged that the parties have stipulated that economists are divided on the issue.

Moreover, the §8 proviso cannot rationally be defended

[20] The only area where truth plays a substantial role in the protection afforded by the constitution to commercial speech. In holding truth to be an important factor the Court in *Virginia Citizens Council* assessed the special character of the governmental interests in that connection and the minimal impact of such a restriction on this class of speaker. (425 U.S. at 770-72, particularly note 24).

upon such a supposed *ultra vires* basis. Two of the plaintiffs are federally chartered banks (Op. p. 4) and it is not obvious what the authority of state law is to structure the ambit of their authority. More generally, the distinction between corporations and other business units makes no sense in light of such a purpose. Nor does § 8 even maintain a consistent policy with respect to business corporations. Nothing prohibits Massachusetts business corporations from now engaging in speech against the graduated income tax or from doing so while that issue is pending before the Massachusetts legislature, or even, as the state court recognized (Op. p. 19), when corporations are communicating to their stockholders about the referendum. That speech is forbidden *only* when the question leaves the legislative forum and is submitted to the people by way of a referendum. Why the instant at which the forum for discussion shifts to the people at large demonstrates that a corporation's opposition to a graduated income tax no longer legally "affects" it is, frankly, a mystery far too deep for us to penetrate.[21] The present statutory scheme is so irrational that it would deny business corporations equal protection of the laws even if no free speech interests were implicated. And, plainly, the discriminations worked by the §8 proviso are so unreasonably underinclusive that the proviso does not satisfy the strict scrutiny required when constitutionally protected interests are at stake. *Police Department* v. *Mosley*, 408 U.S. 92, 96-99 (1972).

In any event, the legislative determination that a referendum on the graduated income tax does not "affect" the corporation cannot be treated as conclusive, since the right to free speech stems from the Fourteenth Amendment, not

[21] The explanation, we think, lies in the dynamics of Massachusetts politics. The legislature has generally favored a state constitutional amendment permitting a graduated personal income tax, but these proposals have repeatedly lost on the ballot.

state, law. Put differently, plaintiffs recognize that the legislature has wide discretion but is not without limits. A state cannot impose unconstitutional conditions on a corporate charter, any more than it can on other statutory permission. *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922). See generally, Note, *Unconstitutional Conditions*, 73 Harv.L.Rev. 1595 (1960).[22]

What we have here is a plainly impermissible content discrimination. Out of a wide range of issues which a corporation might feel impelled to speak about, only one — the graduated state personal income tax — is excised and then only if it is before the people by way of a referendum. To repeat, whatever may be the permissible range of content discrimination, see *Young* v. *American Mini Theatres*, 426 U.S. — (1976), we are aware of no decision which would remotely support the restriction here involved. Any presumed legislative goal of ensuring that a corporation not act *ultra vires* is hardly of the "compelling" *Buckley* v. *Valeo*, 424 U.S. 1, 25, 66-68 (1976) or "paramount" (*Elrod* v. *Burns*, 96 S.Ct. 2673, 2684 (1976)) nature necessary to support a material interference with free speech rights, particularly one aimed directly at the content of speech.

[22] Clearly, therefore, a business corporate charter could not be conditioned upon a limitation that the corporation support the policies of the incumbent governor, or the views of the Democratic Party, or on support of a graduate income tax. Any such limitation, would be an unconstitutional condition violative of the constitutional guarantee of free speech. So here also, the §8 proviso is an unconstitutional condition upon the charter of the business corporations in Massachusetts.

Conclusion

Two courts have recently validated statutory restrictions on corporate political activity in connection with the ballot.[23] We submit, therefore, that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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[23] *C. & C. Playground Corp.* v. *John N. Hanson*, CV-76-81 (H) (D. Montana Sept. 13, 1976); *Pacific Gas & Electric Co.* v. *Berkeley*, 60 C.A. 3d 123, ___ Cal. Reptr. ___ (1976).